88-1

No. 87-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, DC 20036

DENNIS J. MORIKAWA*
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Of Counsel:

MORGAN, LEWIS & BOCKIUS

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* *Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Whether a railroad's inclusion of a drug test in the urinalysis component of its fitness for duty medical examinations constitutes a major dispute under the Railway Labor Act where the railroad has a long-standing and unchallenged policy of performing medical examinations which have included urinalyses.

PARTIES TO PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

Petitioner is Consolidated Rail Corporation. Respondents are Railway Labor Executives' Association; American Railway and Airway Supervisors Association, Division of BRAC; American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Railway Carmen of the United States and Canada; Hotel Employees & Restaurant Employees International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Association; Seafarers International Union of North America; Sheet Metal Workers International Association; Transport Workers Union of America; United Transportation Union.

Petitioner has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron & Barberton Belt Railway Company

Albany Port Railway Corporation

American Casualty Excess Insurance, Ltd.

The Belt Railway Company of Chicago

Chicago & Western Indiana Railway Company

Indiana Harbor Belt Railroad Company
Calumet Western Railway Company

The Lakefront Dock and Railroad Terminal Company

The Monongahela Railway Company

Nicholas, Fayette & Greenbrier Railroad Company

Peoria & Pekin Union Railway Company

Pittsburgh Chartiers & Youghiogheny Railway Company

Railroad Association Insurance, Ltd.

Trailer Train
Calpro Company
Railbox Company
Trailer Train Finance, N.V.

Transportation Data Xchange, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Consolidated Raii Corporation ("Conrail") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 846 F.2d 1187 (3d Cir. 1988), and is reproduced in the Appendix at A-1 to A-19. The Order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Appendix at A-23 to A-26.

JURISDICTION

The decision of the Court of Appeals was entered on April 25, 1988. On May 6, 1988 the Court of Appeals

stayed the issuance of its mandate until June 1, 1988. On June 6, 1988, the Court of Appeals extended the stay of its mandate until June 10, 1988. On June 9, 1988, the Court of Appeals extended the stay until June 30, 1988. A-20 to A-22. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

STATUTE INVOLVED

Sections 2, 3 and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, 153 and 156 (1982), are set forth in the Appendix at A-27 to A-47.

STATEMENT OF THE CASE

This case involves the important question of the ability of rail and airline carriers to implement and maintain medical fitness for duty policies which have for decades been a critical component of the safe operation of the railroads and airlines.[1] Since its very inception, Conrail has had a policy of conducting routine medical examinations of its employees to determine their fitness for duty. This policy has, for years, included diagnostic tests including urinalyses designed to detect medical conditions which could limit or restrict employees in the safe performance of their jobs. Conrail has, without challenge from the unions, regularly amended and modified such policies including adding new diagnostic tests in order to remain current with changing medical technology. Employees found to be unfit to perform their jobs safely have always been subject to removal from service by Conrail's medical department.

The necessity of these medical fitness for duty determinations was magnified by the tragic accident which occurred at Chase, Maryland on January 4, 1987 when an Amtrak passenger train collided with Conrail

1. Both railroads and airlines are subject to the provisions of the Railway Labor Act, 45 U.S.C. §§151 et seq. and 181 (1982).

locomotives killing sixteen persons and injuring 174 others. The subsequent determination that the Conrail engineer and brakeman had been using marijuana prior to the accident heightened the need for Conrail to enhance its response to the problem of drug and alcohol abuse by its employees.[2] As a result, on February 20, 1987, Conrail announced that a drug test would be added to the urinalysis portion of its periodic and return to work fitness for duty medical examinations.

Despite Conrail's long-standing and unchallenged policy of performing fitness for duty medical examinations, the Third Circuit found that the addition of a drug test to the existing urinalysis was a "major" dispute under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (1982). The court concluded that Conrail's addition of the drug test to the urinalysis component of the medical examination constituted a change in the terms and conditions of employment which Conrail could not impose without first bargaining with the unions.

The Third Circuit's decision is in direct conflict with the decisions of the United States Courts of Appeals for the Seventh and Eighth Circuits in *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). The Seventh and Eighth Circuits held on virtually identical facts that the addition of a drug test to the existing urinalysis component of a medical fitness for duty examination was a "minor" dispute under the RLA. Therefore, the railroads in those cases were permitted to unilaterally add a drug test to

2. The National Transportation Safety Board later concluded that the Chase, Maryland accident was caused by the Conrail engineer's use of marijuana. Department of Transportation, Notice of Proposed Rulemaking, Railroad Operating Rules; Random Drug Testing Program, 53 Fed. Reg. 16,640 (1988)(to be codified at 49 C.F.R. pts. 217, 219) (proposed May 10, 1988).

the routine urinalysis portion of their established medical examination programs without having to bargain with the unions over its implementation. Employees were, however, permitted to challenge the effect of these policies in accordance with the arbitration procedures mandated by the RLA.

The Third Circuit's decision creates an intercircuit conflict on an issue of substantial public importance — the ability of railroads and airlines to maintain, develop and improve medical programs to insure that all employees are fit for duty. The decision also places into irreconcilable dispute the ability of railroads and airlines to make critical fitness for duty determinations and, as a practical matter, makes it impossible for Conrail, which operates within the Third, Seventh and Eighth Circuits, to apply consistent medical standards on a system-wide basis.

I. Major v. Minor Disputes Under The Railway Labor Act.

The RLA was enacted by Congress in 1926 to restore harmony to labor-management relations in the railroad industry. The Act itself was the product of a joint effort by labor and management representatives to channel labor disputes into constructive resolution procedures as a means of avoiding interruptions to commerce and preventing strikes. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148-49 & n.13 (1969). The RLA provides for two distinct types of disputes: "major" disputes which involve contract formation, amendment or acquisition of new rights; and "minor" disputes, which involve the interpretation or application of an existing collective bargaining agreement. Both of these categories are "sharply distinguished." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-723 (1945); *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153-54 (1969); *Brotherhood of Locomotive Engineers v.*

Burlington Northern R.R., 838 F.2d 1087, 1089 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631).[3]

Major disputes involve "the formation of collective [bargaining] agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723. The procedures under the RLA for resolving major disputes contemplate resort to an extensive mediation and conciliation mechanism and require the parties to resolve such disputes through negotiation, mediation and possible presidential intervention. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, *reh'g denied*, 394 U.S. 1024 (1969); *Detroit & Toledo Shore Line R.R.*, 396 U.S. at 148-150. Coupled with this extensive bargaining obligation is the obligation on the part of both parties to maintain the status quo until the process has been exhausted, a process which has been described by this Court as "almost interminable." *Detroit & Toledo Shore Line R.R.*, 396 U.S. at 149, 150-53. The purpose of these exhaustive requirements is that if a major dispute cannot be resolved, the union can strike in support of its position. *National Ry. Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 745 (7th Cir. 1987).

By contrast, "minor" disputes "contemplate the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper

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3. The terms "major" and "minor" disputes do not appear in the RLA, but are the product of judicially created categories. *See Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723-24.

application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723.[4] The resolution of minor disputes is brought about through a formal grievance process subject to binding arbitration by the National Railroad Adjustment Board ("NRAB"), 45 U.S.C. § 153. Resolution of grievances in this process does not entitle the union to strike. 325 U.S. at 726.

In determining whether a dispute is "minor" the court's obligation has generally extended to a determination of whether the position of one of the parties can "arguably" be justified by the existing agreement. *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974). It is not necessary that the terms of a collective bargaining agreement be set forth in a written document; they can be inferred from habit and custom. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d at 1091-92. Past practice, accepted or acquiesced in by a party, becomes part of the contract. *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986). So long as the parties' interpretation of the agreement is "even argua-

4. The "omitted case" refers to rights firmly grounded in past practice or prior courses of dealing and can include a situation "arguably within the scope of residual managerial prerogative left with the [carrier] by the agreement." *Airline Flight Attendants v. Texas Int'l Airlines, Inc.*, 411 F. Supp. 954, 959 (S.D. Tex. 1976), *aff'd mem.*, 566 F.2d 104 (1978), *citing United Industrial Workers of Seafarers' Int'l Union v. Board of Trustees of Galveston Wharves*, 351 F.2d 183, 188 (5th Cir. 1965). *See also Railway Labor Executives' Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994, 996-97 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

ble" or if the claims are not "frivolous" or "obviously insubstantial," the dispute will be deemed "minor."[5]

"The fundamental inquiry in deciding whether to assume jurisdiction to grant injunctive relief is not to interpret the contract; rather, the court must decide whether the asserted contractual defense is frivolous." *United Transp. Union General Committee of Adjustment v. Baker*, 499 F.2d 727, 730 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974). Further, in cases where there is some doubt regarding whether a dispute is a "minor" dispute, it should be treated as "minor" subject to the mandatory and exclusive jurisdiction of the NRAB:

> Since the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries — producers of a nonstorable service

5. *See, e.g., International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988) ("arguably justified"); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1111 (9th Cir. 1988) ("arguably justified"), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631); *National Ry. Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987) (minor unless claim is "frivolous" or "obviously insubstantial"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) ("reasonably susceptible" to asserted interpretation); *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir.) (court's role is limited to determining whether carrier's assertion is "even arguable"), *cert. denied*, 107 S. Ct. 169 (1986); *Brotherhood Ry. Carmen v. Norfolk & Western Ry.*, 745 F.2d 370 (6th Cir. 1984) ("arguably justified" or not "obviously insubstantial"); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983) (not "obviously insubstantial"), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *International Brotherhood of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972) ("reasonably susceptible" to carrier's contention), *cert. denied*, 411 U.S. 906 (1973).

— can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor.

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry., 768 F.2d 914, 920 (7th Cir. 1985). *See also Brotherhood Ry. Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 374-75 (6th Cir. 1984); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 947-49 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d at 705 ("[b]ecause a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d at 1022 (referring to the "relatively light burden which the railroad must bear in showing that its actions are at most minor changes and thus within the status quo").

II. Conrail's Fitness For Duty Medical Program.

Since its inception, Conrail has conducted routine medical examinations to determine employees' fitness for duty. These medical examinations have been conducted periodically and upon an employee's return to duty following an extended absence. Over the years, Conrail has, without any bargaining or request to bargain by the unions, revised, modified and changed these medical standards to reflect advances in medical technology. A-48 to A-49. The procedures governing these medical examinations are set forth in Conrail's Medical Standards Manual. A-49. The examinations have routinely included a urinalysis for blood sugar and albumen. A-49, A-58 to A-59. A drug test was also included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs. A-59.

Employees who undergo a periodic or return to duty physical examination and who fail to meet Conrail's established medical standards are routinely held out of service without pay until the condition is corrected or eliminated. Thus, employees have been held out of service until their vision was corrected or their blood pressure or elevated blood sugar was reduced. A-50 to A-51.

Beginning in February, 1987, Conrail added a drug screen to the existing urinalysis component of its routine medical examinations. If drug use was detected in any of these medical examinations, an employee would not be allowed to return to work unless he could provide a negative drug test within forty-five days at a medical facility recommended by Conrail's Medical Director. An employee whose first test was positive would be given the opportunity for an evaluation by Conrail's Employee Counseling Service. If the evaluation revealed evidence of possible drug addiction and the employee agreed to enter an improved treatment program, the employee would be given an extended period of one hundred twenty-five days to provide a negative drug test result. A-50 to A-51.

Separate and apart from medical fitness for duty determinations, Conrail has for many years enforced a disciplinary rule known as "Rule G" which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such substances by employees subject to duty, and which requires employees under medication to be certain that such use will not affect the safe performance of their duties. A-57. Conrail has traditionally relied upon two methods of detecting Rule G violations — supervisory observation and encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine, or other diagnostic tests. A-58.

The dramatic increase in drug or alcohol related accidents in the railroad industry and particularly the tragic accident at Chase, Maryland, caused Conrail to focus more critical attention on its medical fitness for duty determinations through enhanced diagnostic measures supervised by its Medical Department.[6] On February 20, 1987 Conrail announced that a drug test would be included as part of the already existing urinalysis required in all periodic and return to duty medical examinations or any periodic-special examinations as required by physicians.[7]

III. Decisions Of The Courts Below.

Claiming that Conrail's implementation of such testing was a new term or condition of employment which required Conrail to bargain prior to its implementation, the Railway Labor Executives' Association and unions representing Conrail employees ("RLEA" or "unions") filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking to

6. The tragic consequences of drug and alcohol abuse in the transportation industry are vividly recited both in the Department of Transportation's Notice of Proposed Rulemaking, 53 Fed. Reg. 16,640 (1988) (to be codified at 49 C.F.R. pts. 217, 219) (proposed May 10, 1988), and in the petitions for writs of *certiorari* filed in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988) and *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631).

7. Drug screen urinalysis as part of medical fitness for duty determinations are standard in the industry and encouraged by the Federal Railroad Administration. "The FRA notes that it has long encouraged railroads to test employees in the context of its medical qualification programs, with the test results to be used exclusively in the context of those programs." Department of Transportation's Notice of Proposed Rulemaking, *supra* n.5, 53 Fed. Reg. 16,647 (1988).

enjoin Conrail from requiring employees represented by the RLEA unions to undergo drug testing.

Based on a joint stipulation of the parties and uncontradicted facts in the form of affidavits, answers to interrogatories and responses to requests for production of documents, the district court rejected the RLEA's contention that addition of a drug test to the urinalysis component of Conrail's existing medical program constituted a "new" policy which required Conrail to bargain with the unions In its order dismissing the complaint, the court noted that Conrail had always required all hourly employees to undergo periodic and return to duty physical examinations including urinalyses, and that drug tests had in the past been used by Conrail where drug use was suspected or where prior drug problems existed. A-24. The court also found that the unions had acquiesced in Conrail's procedures to ensure an employee's fitness for the job because the unions had always recognized Conrail's right to remove from service employees who were unable to perform their duties safely. Therefore, the court concluded that Conrail's drug testing program was simply a "further refinement" of that practice and was consistent with its right to ensure the safety of its operations. A-25. On the basis of these findings, the court held that Conrail's decision to implement the drug test was a "minor" dispute under the Railway Labor Act because such decision was "arguably justified" by its long-standing medical fitness for duty policy. *Id.*

On appeal, the Third Circuit reversed the district court and remanded the case for further proceedings consistent with its opinion. A-19. While recognizing that two prior cases, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), both dealing with medical examination

programs virtually identical to that presented in this case, had concluded that the addition of drug tests to the urinalysis component of existing fitness for duty medical examinations was a "minor dispute" under the RLA, the Third Circuit concluded that "[t]he absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts." A-14.

The Third Circuit announced that the standard to be applied in determining whether a minor dispute existed in this case was whether ". . . it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue." A-14. In short, the court held that it must determine "whether the existing agreement arguably admits of an implied term encompassing the new drug screening" [citations omitted]. *Id.*

The court relied on the reasoning of the dissenting opinion in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1025 (8th Cir. 1986) (Arnold, J. dissenting in part), by reading that opinion to find that " . . . whether the testing was characterized as a medical or disciplinary matter, the medical testing program could result in an employee's being fired without any prior suspicion of drug use." A-13 to A-14. The Third Circuit's reliance on the above reasoning evidences its belief that because drug use, as distinguished from any other detectable medical condition which could limit an employee's fitness for duty, was more "controversial" and "poses serious ethical and practical dilemmas as well," A-16, there could be no "meeting of the minds" on drug testing without evidence of a specific agreement between Conrail and the unions regarding such testing. In so holding, the court disregarded the more than ten year unchallenged practice by Conrail of unilaterally implementing, and from time to time altering and modifying, existing fitness for duty determinations which had always included urinalyses and in some cases drug testing.[8]

On the basis of the above, the Third Circuit concluded that, despite Conrail's long-standing prerogative of setting and maintaining medical fitness for duty standards, the addition of a drug test to the existing urinalysis component of Conrail's medical fitness for duty policy was not "arguably justified" by the prior practice.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision That Conrail's Addition Of A Drug Test To Its Fitness For Duty Medical Examinations Constituted A Major Dispute Under The Railway Labor Act Is In Direct Conflict With Decisions Of The Seventh and Eighth Circuits On The Identical Issue.

The Third Circuit decided that Conrail's addition of a drug test to the urinalysis component of its fitness for duty medical examination constitutes a major dispute under the Railway Labor Act. The Third Circuit reached this conclusion despite prior decisions to the contrary by both the Seventh and Eighth Circuits involving identical facts and issues. The Third Circuit's decision has therefore created a conflict among the courts of appeals on this issue.

In the Eighth Circuit case, *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), Burlington

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8. While the Third Circuit acknowledged that in 1984 Conrail issued a new Medical Standards Manual requiring a drug screen to be carried out in connection with all periodic examination urinalyses, the court apparently found it significant that such screening was performed in only one of its four administrative regions, the Eastern Region, but was discontinued for budgetary reasons after six months. Without any basis in fact in the record, the court concluded that although such testing was performed for over six months in Conrail's entire Eastern Region, "uniform testing" was ". . . without the apparent knowledge or agreement of the Unions. . . ." A-15.

Northern ("BN"), like Conrail, had an unchallenged past practice of "requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees are fit for duty. . . ." 802 F.2d at 1024. BN's medical examination policy was almost identical to Conrail's and had "always included laboratory examination of urine and blood samples." Moreover, the only change that BN made was simply to add a drug test to the urinalysis portion of its medical examination. *Id.*

The Eighth Circuit, after extensively analyzing the application of the standard for determining major and minor disputes, concluded that BN's addition of drug testing to its fitness for duty medical determinations was a minor dispute. The court found that the unions had never challenged BN's right to establish fitness for duty standards or its right to ensure the safety of its operations "by removing from service any employee who is unable to perform his duties safely." 802 F.2d at 1024. Therefore, the court concluded, "all that is involved . . . is the extent to which the urinalysis component of these [fitness for duty] examinations may be refined in order to predict safe employee performance." *Id.* The court found that in addition to the fact that the underlying purpose of the medical examination—to determine fitness for duty—remained the same as before the drug test was added, it was not unreasonable to assume that fitness for duty standards might change with the times. On the basis of these findings, the Eighth Circuit held that BN's action was arguably justified by its past practice of controlling fitness for duty standards and therefore constituted a minor dispute which should be submitted to the National Railroad Adjustment Board.

In the Seventh Circuit case, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), the court reached the same conclusion based on similar reasoning. Norfolk and Western's ("N&W") practice, unchallenged by the union for twenty years, had been to require employees to provide a urine sample

during regular and return to work medical examinations. 833 F.2d at 702. In 1984, N&W added a drug test to its already existing urinalysis. The Seventh Circuit found that the parties' collective bargaining agreements, though silent on the issue, encompassed the past practice of fitness for duty medical examinations. 833 F.2d at 706. This past practice, the court found, accorded N&W the unilateral authority to determine the appropriate tests to include in the required medical examinations. *Id.* Thus, the addition of drug testing to fitness for duty examinations was found to be arguably justified by the parties' past practice.

The decisions by the Seventh and Eighth Circuits, which dealt with identical factual situations to that of Conrail, concluded that the addition of a drug screen to an existing urinalysis component of a periodic fitness for duty medical examination was not a new condition of employment but was arguably justified by the railroads' prior practices. Finding that the underlying purpose of the medical examinations was to ensure the fitness of employees for duty, both the Seventh and Eighth Circuits concluded that a drug screen was nothing more than a refinement of the prior techniques utilized by the railroads' medical departments. Although both courts recognized that employees could be removed from service based on such medical determinations, this did not elevate these issues to "major" disputes.

The Seventh and Eighth Circuit decisions stand in sharp contrast to the decision by the Third Circuit in this case. Conrail's medical fitness for duty policies had a similar history and contained virtually identical provisions to those involved in the Seventh and Eighth Circuit decisions. Each railroad had for a number of years conducted periodic and return to duty physical

examinations. Over the years, Conrail unilaterally, without any bargaining or request to bargain, revised, modified or changed these medical standards to reflect advances in medical science and medical technology. A-48.

Notwithstanding the striking similarities between the medical policies and the drug tests which were added in each case, the Third Circuit reached a completely opposite conclusion from those reached by the Seventh and Eighth Circuits. Despite recognizing that the Seventh and Eighth Circuits were presented with "issues almost identical to those we confront here," A-12, the Third Circuit went on to ignore those decisions based on a perceived "absence of uniformity in interpretation by the other courts. . . ." A-14.

The conflict created by the decisions of the Third, Seventh and Eighth Circuits must be directly addressed by this Court. By reaching a conclusion different from that of the Seventh and Eighth Circuits, the Third Circuit has injected confusion into an issue that should be straightforward under the "major-minor" dispute standard of the RLA. The effect of this conflict among the circuits is that railroads and airlines subject to the jurisdiction of the Seventh and Eighth Circuits will be able to implement fitness for duty drug testing policies under the RLA's minor dispute procedures, while those subject to the jurisdiction of the Third Circuit will have to proceed through the RLA's exhaustive bargaining processes before implementing the same drug testing. Railroads and airlines in the Third Circuit will be delayed for a substantial period of time not only in implementing drug testing, but could be prevented from making any modifications to medical fitness for duty determinations without first bargaining with the unions.

There is no certainty that further appellate court decisions will resolve the conflict created by the Third Circuit's opinion, and in the time spent waiting for such decisions, public safety will be seriously threatened by

the problem of drug abuse among railroad employees. Given the urgent nature of the safety threat to railroad employees and the general public posed by drug abuse among railroad employees, this Court must not wait to decide this issue.

II. The Court Below Ignored Established Supreme Court Precedent By Relying Upon National Labor Relations Act Principles To Determine This Important Issue Under The Railway Labor Act.

In determining whether Conrail's use of drug testing procedures constituted a minor dispute or major dispute under the RLA, the Third Circuit stated that it was applying the following standard:

> [I]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

A-9, *citing Local 1477 United Transp. Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973). The "arguably justified" or "not obviously insubstantial" standard has been uniformly applied by the courts of appeals in recognition of the unique procedures established by the RLA for the resolution of labor-management disputes. *See* cases cited at note 5, *supra*.

Although the Third Circuit identified the correct test under the RLA, it proceeded to ignore that test, as well as established precedent of this Court, by relying upon principles derived under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1973). Specifically, the Third Circuit relied upon a "Guideline Memorandum" prepared by the General Counsel of the National Labor Relations Board ("NLRB") in September of 1987. NLRB General Counsel Memorandum 87-5, 4

Lab. L. Rep. (CCH) ¶ 9344 (1987). In analyzing the major-minor dispute issue under the RLA, the Third Circuit noted the critical importance of the General Counsel's "Guideline Memorandum" to its decision as follows:

> We regard it as *particularly significant* that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations Act. *See* National Labor Relations Board, Office of the General Counsel Mem. GC 87-5 (Sept. 8, 1987), *reprinted in* Daily Labor Report (BNA), No. 184 at D-1 (Sept. 24, 1987) ("When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination.")

A-16 to A-17. (emphasis added).

Immediately following the foregoing quotation, the court concluded that, because Conrail could not point to any "existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed," its use of drug testing procedures constituted a major dispute under the RLA. A-17. Thus, in assessing Conrail's actions, the Third Circuit applied NLRA principles of "clear and unmistakable waiver" and "mandatory subject of bargaining" instead of determining whether Conrail's action was "arguably justified" by its collective bargaining agreements, past practices, habits and customs. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969). Instead of applying the relatively light

burden uniformly acknowledged by other courts of appeals in determining whether a dispute is major or minor, the Third Circuit required Conrail to prove the existence of an express contractual agreement giving it the right to proceed with drug testing, an analysis that is more apt in determining bargaining obligations under the NLRA. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (a union's waiver of a statutory right under the NLRA will not be found unless "the undertaking is 'explicitly stated.' ").

By incorporating the NLRA's "mandatory subject of bargaining" and "clear and unmistakable waiver" analyses into the RLA, the Third Circuit acted directly contrary to this Court's admonition that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, *reh'g denied*, 394 U.S. 1024 (1969).

Indeed, this Court has often expressed its reluctance to apply the substantive policies derived under the NLRA to the unique structure established by the RLA. *See, e.g., Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987) (NLRA principles of secondary picketing are not applicable to the RLA); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 391 ("although, in the absence of any other viable guidelines, we have resorted to the NLRA for assistance in mapping out very general boundaries of self-help under the Railway Labor Act, there is absolutely no warrant for incorporating into that Act the panoply of detailed law developed by the National Labor Relations Board and courts under § 8(b)(4)"). This has been particularly true where the issues under the two statutes have involved the scope of collective bargaining. *See, e.g., Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570, 579

n.11 (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 & n.23 (1981), *citing Chicago & North Western Ry. v. Transp. Union*.

The Third Circuit's application of the General Counsel's analysis of the obligation to bargain about drug testing under the National Labor Relations Act ignores the critical differences between the two statutes. The "arguably justified" standard uniformly applied by the courts in determining the existence of a major dispute that would be subject to collective bargaining differs fundamentally from the "clear and unmistakable waiver" analysis applied under the NLRA. Under the NLRA, a heavy burden is imposed upon the employer to demonstrate that the union has clearly and unmistakably waived the right to bargain with respect to a management decision. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952). On the other hand, under the RLA, the railroad employer need only sustain a "relatively light burden" of demonstrating that its action was "arguably justified" by the existing collective bargaining agreement. *Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1022. Moreover, the RLA permits an employer to rely far more heavily upon its past practices, customs and habits than does the NLRA. *Compare Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. at 153-54 *with NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969) *and Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013 (1982), *enforced*, 722 F.2d 1120 (3d Cir. 1983).

Review by this Court is necessary to remedy the Third Circuit's disregard for this Court's precedent disfavoring reliance upon NLRA principles in analyzing

issues under the RLA standards.[9] It is imperative that the public policy questions raised by drug and alcohol abuse in the railroad and airline industries be decided with reference to the unique procedures created under the RLA and not by substantive rules decided under an entirely different statutory scheme. This is particularly so where the sole "precedent" under the NLRA relied upon by the Court is an unreviewed "Guideline Memorandum" that does not even set forth the view of the National Labor Relations Board or a reviewing court of appeals, but merely the "position" of the chief prosecutor under the Act. This important issue must be determined based on precedent interpreting the RLA and not on the basis of an unreviewed advisory opinion interpreting the NLRA.

III. This Court Should Grant The Petition In This Case Irrespective Of Its Consideration Of The Petition For Certiorari Filed In Burlington Northern R.R. v. Brotherhood Of Locomotive Engineers, No. 87-1631, Oct. Term 1987.

Two courts of appeals have considered, with similarly inconsistent results, a related but distinctly different issue of whether a drug testing policy, explicitly designed as a method of enforcing Rule G, is a major or

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9. In addition to the Third Circuit, the Fifth Circuit has also recently fallen into the trap of viewing the two statutes as coextensive. In *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988), the Fifth Circuit, in a confusing opinion which applied standards for determining mandatory subjects of bargaining under the NLRA to a case arising under the RLA, held that Southwest's use of drug testing to enforce Rule G constituted a "mandatory subject of bargaining" under the RLA. Further compounding the confusion, the court held that the union had not clearly and unmistakably waived its right to bargain over drug testing. Finally, relying in part on the "Guideline Memorandum" prepared by the NLRB General Counsel, No. 87-5, 4 Lab. L. Rep. (CCH) ¶ 9344 (1987), the court concluded that Southwest's drug testing program created a "major" dispute.

minor dispute under the RLA. In a separate opinion in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1023 (8th Cir. 1986), the Eighth Circuit determined that the enforcement of Rule G through post-incident drug testing was a minor dispute, because the railroad had merely altered the degree of particularized suspicion required before a test was conducted. By contrast, the Ninth Circuit subsequently held that the same railroad's Rule G drug testing policy was a major dispute because it was a more intrusive method of enforcing Rule G than had been applied in the past, and thus constituted a change in working conditions under the parties' agreement. *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631).

Irrespective of this Court's ultimate ruling on *certiorari* in *Burlington Northern*, the independent split among the Third, Seventh and Eighth Circuits regarding the RLA's application to medical fitness for duty testing policies compels immediate resolution by this Court. The prevalent practice in the industry includes both reasonable cause testing (which is involved in the *Burlington Northern* cases) as well as medical fitness for duty testing. The railway and airline industries need guidance with respect to the applicability of the RLA to both forms of testing.

If the Court determines that there is sufficient overlap between this case and *Burlington Northern*, Conrail requests that this case be held for consideration pending ultimate resolution of the petition for *certiorari* or of the merits in *Burlington Northern*. If this Court should defer consideration of *Burlington Northern* pending this Court's review of *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988), Conrail requests that the instant case also be held for consideration.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, D.C. 20036

Of Counsel:
MORGAN, LEWIS & BOCKIUS

DENNIS J. MORIKAWA*
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

June 30, 1988

* Counsel of Record

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1289

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, DIVISION OF BRAC; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; UNITED TRANSPORTATION UNION,

Appellants

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil No. 86-2698)

Argued November 3, 1987

Before: SLOVITER and BECKER,
Circuit Judges, and
COWEN, *District Judge**

(Opinion filed April 25, 1988)

Lawrence M. Mann (Argued)
Alper & Mann
Washington, D.C. 20001

Cornelius C. O'Brien, Jr.
O'Brien and Davis, P.C.
Philadelphia, PA 19102

Attorneys for Appellants

Dennis J. Morikawa (Argued)
Joseph J. Costello
Philadelphia, PA 19103

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*Hon. Robert E. Cowen, United States District Court for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

Hermon M. Wells
Consolidated Rail Corporation
Philadelphia, PA 19104

Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The issue presented by the Unions' appeal is whether the railroad's unilateral addition of a drug-screening component to its employees' medical examinations gives rise to a "minor" dispute under the Railway Labor Act over which the district court had no subject matter jurisdiction or to a "major" dispute which would entitle the parties to an injunction maintaining the status quo while they bargain over the change. This case concerns only the process pursuant to which drug screening may be introduced; it has nothing to do with whether drug screening is a good idea.

The district court concluded that the parties' prior practice with respect to medical examinations "arguably justified" the railroad's unilateral imposition of uniform drug screening and dismissed the Unions' action for want of jurisdiction. We will reverse.

I.

Background

A.

Facts

Plaintiffs, the Railway Labor Executives' Association, whose members head railway labor unions representing all crafts, and eighteen unions representing those crafts (hereinafter "Unions"), and defendant Consolidated Rail Corporation ("Conrail"), a railroad, have stipulated to the essential facts in this case. Since its formation in 1976, Conrail has required all employees to

undergo periodic physical examination at intervals varying between one and three years depending on the employee's age and job classification, and has required an examination upon the return to duty of all employees operating trains and engines who were out of service thirty days or longer and of all other employees out of service ninety days or longer "due to furlough, leave, suspension or similar causes." App. at 71. These examinations have routinely included urinalysis for blood sugar and albumin.

Conrail employees always have been subject to Rule G or its equivalent, an industry-wide rule, which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such substances by employees subject to duty, and which requires employees under medication to be certain that their safe performance of duty is not compromised. This rule has been enforced in the past principally by supervisory observation.

Conrail has routinely used drug screening urinalysis as part of the return-to-duty medical examination of any employee previously taken out of service because of a drug-related problem, and in both periodic and return-to-duty examinations, when the examining physician suspected drug abuse. In applying Rule G, Conrail "encourag[ed] employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine, or other diagnostic tests." *See* App. at 70; *cf. Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1089 (9th Cir. 1988) (railroad's employee suspected of drug use could avoid suspicion by voluntarily submitting to urinalysis); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R. R. Co.*, 802 F.2d 1016, 1018 (8th Cir. 1986) (Arnold, J., for a unanimous court, concurring in part) (same).

In February 1986, the regulations of the Federal Railway Administration on "Control of Alcohol and Drug

Use in Railroad Operations" became effective. 49 C.F.R. §219 (1987). These regulations require post-accident drug screening by urinalysis, breathalizer and/or blood testing for all employees covered by the Hours of Service Act, 45 U.S.C. §61-66 (1982), *i.e.*, for operating employees.[1] Employees reasonably suspected of being under the influence of a prohibited substance may also be tested if they are involved in an operating rule violation or contribute to an accident. The application of these regulations to covered employees is not at issue on this appeal.

On February 20, 1987, Conrail announced its unilateral decision to include a drug screen as part of the urinalysis in all periodic and return-to-duty examinations, and in any special examinations deemed necessary by the physician after a return from a drug-related absence from duty. The Unions filed suit in district court alleging that Conrail's action violated Section 6 of the Railway Labor Act, 45 U.S.C. §156 (1982), and the Fourth Amendment's prohibition of unreasonable search and seizure and sought to enjoin Conrail from instituting the drug testing.

All parties moved for summary judgment. The district court, based on the facts set forth above, concluded that "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy." *See Railway Labor Executives' Ass'n v. Conrail*, No. 86-2698, slip op. at 3 (E.D. Pa. April 28, 1987). It therefore found the dispute to be a "minor" one and dismissed the counts of the complaint

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1. The Hours of Service Act applies to any "individual actually engaged in or connected with the movement of any train," but not to all railroad employees. 45 U.S.C. §61(b)(2). The Court of Appeals for the Ninth Circuit has recently held the Federal Railway Administration regulations to be unconstitutional under the Fourth Amendment. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988). That issue is not before us.

based on the Railway Labor Act. The court also dismissed the Fourth Amendment claim on the ground that Conrail is not a government enterprise. *Id.* at 3-4. The Unions appeal only the order dismissing the Railway Labor Act counts.

The district court's conclusion that the drug-testing program constitutes a minor dispute is a legal determination. *Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d at 1089; *see Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 755 (3d Cir. 1977); *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543-45 (3d Cir. 1974). *But see Railway Labor Executives' Ass'n v. Norfolk and Western Ry. Co.*, 833 F.2d 700, 707 (7th Cir. 1987). Because the district court dismissed the claims pursuant to the undisputed facts, its order, akin to a grant of summary judgment, is subject to plenary review. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *cf. Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986) ("dismissal of a complaint for lack of jurisdiction . . . raises a question of law subject to plenary review").

B.

Major and Minor Disputes

This court has recently had occasion to review the statutory background of the Railway Labor Act in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co.*, No. 87-3797 (3d Cir. April 8, 1988). Therfore, we will only briefly discuss the provisions relating to major and minor disputes insofar as necessary to an understanding of the issue before us.

The Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.*, was passed in 1926 to facilitate labor peace in the railroad industry, then the backbone of the American transportation system. *See* H.R. Rep. No. 328, 69th Cong., 1st Sess. 1-3 (1926) [hereinafter *1926 House Report*]; *Baker v. United Transp. Union*, 455 F.2d 149, 153-54 (3d Cir. 1971). In an unprecedented cooperative process, the Act was drafted by negotiators for railroad management and labor and presented to Congress as, essentially, a finished product. *See 1926 House Report* at 1, 3. In its original form, the Act did not provide compulsory arbitration for any claim; it worked instead to prevent strikes and lockouts by funneling disputes into "purposely long and drawn out [procedures], based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966); *see Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 725-27 (1945).

From the beginning, the Act made a distinction between disputes arising from grievances and the interpretation of a contract ("minor" disputes), on the one hand, and disputes arising from changes in pay rates, work rules and working conditions ("major" disputes), on the other. *See* Railway Labor Act, Pub. L. No. 257, §§3, First, 5(a)-(b), 6, 44 Stat. 577, 578-82 (1926); *see also Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30, 35 (1957). Originally, minor disputes could be submitted to binding arbitration by "adjustment boards" composed of equal representatives of labor and management voluntarily established by the parties. The inability of the parties to agree to such boards and the deadlock in thousands of disputes before boards led Congress to amend the Act in 1934 to create the National Railroad Adjustment Board before which either side in a minor dispute can submit the issue to compulsory arbitration if the parties have not agreed on their own arbitrators. Railway Labor Act, ch. 691, §23, 48 Stat. 1185, 1189-93 (1934); *Trainmen*, 353 U.S. at 39; *Elgin*, 325 U.S. at 726. *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 574-76 (1937). The carrier is not barred in minor disputes from introducing

the disputed change during the pendency of the arbitration proceedings. *See* 45 U.S.C. §153; *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 754 n.6 (3d Cir. 1977); *cf.* 45 U.S.C. §156.

In contrast, parties to a major dispute have always been required to proceed through a more extensive mediation and conciliation mechanism as specified by sections 5 and 6 of the Act. 45 U.S.C. §§155-56; *see 1926 House Report* at 3-5; *Elgin*, 325 U.S. at 725-26. During this process, the parties are entitled to an injunction, if necessary, to preserve the status quo. *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543 (3d Cir. 1974) (per curiam).[2]

The legislative history makes clear that labor's acquiescence to the RLA's procedure, including management's right to introduce changes in "minor" dispute situations, was dependent on the general understanding that "minor" disputes, with their attendant compulsory arbitration, were to be limited to "comparatively minor" problems, "represent[ing] specific maladjustments of a detailed or individual quality," *Elgin*, 325 U.S. at 724, in contrast to the "large issues about which strikes ordinarily arise," *id.* at 723-24. *See Trainmen*, 353 U.S. at 39 (general understanding was that compulsory arbitration covered only a "limited field"). *See generally* Garrison, *supra*, at 586-91 (describing typical minor disputes).

The classic explanation of the distinction between major and minor disputes appears in *Elgin*. Major disputes are said to arise "where there is no [collective

2. There are four, narrowly-cabined situations in which a district court may have subject-matter jurisdiction in a minor dispute despite non-exhaustion of the arbitration procedures. Childs v. Pennsylvania Fed. Bhd. of Maintenance of Way Employees, 831 F.2d 429, 437-38 (3d Cir. 1987). One of them, applicable "when resort to administrative remedies would be futile," Sisco v. Conrail, 732 F.2d 1188, 1190 (3d Cir. 1984), has been raised by the Unions here. Because of our disposition of the case, we do not reach this question.

bargaining] agreement or where it is sought to change the terms of one. . . . They look to the acquisition of rights for the future, not the assertion of rights claimed to have vested in the past." 325 U.S. at 723. Minor disputes arise where an existing agreement is being applied, "a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Id.*; *accord Trainmen*, 353 U.S. at 33 ("These are controversies over the meaning of an existing collective bargaining agreement, generally involving only one employee.")

We have adopted the following test to assist in determining whether the dispute is a minor one:

> [I]f the disputed action of one of the parties can "arguably" be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not "obviously insubstantial", the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

Local 1477 United Transp. Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973), *quoted in United Transp. Union v. Penn Central*, 505 F.2d at 544; *accord, e.g., Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988). For this purpose, it is not necessary that the terms of a collective bargaining agreement governing relations under the Act be embodied in a written document; instead they may be inferred from habit and custom. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Eng'rs v. Burlington Northern*, 838 F.2d at 1091-92; *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (Arnold J., for a unanimous court, concurring).

In this case, the district court found, and the parties do not dispute, that Rule G and the medical examination policy, although not incorporated in the parties' written agreement, constitute implied-in-fact contractual terms. Thus, we reach the principal issue: whether Conrail's imposition of a drug screen was an interpretation of one or both of these agreements thereby constituting it as a minor dispute under 45 U.S.C. §153, First, (i), which it could institute unilaterally, or whether its attempt to impose such a drug screen was a new term constituting a major dispute under 45 U.S.C. §152, Seventh, over which it must bargain.

III.

Discussion

The Unions argue that the incorporation of a drug-screen test as an element of the urinalysis required in all periodic and return-to-duty physical examinations is a change in the existing rules and working conditions. They argue that the working conditions had not previously encompassed testing employees for drugs without some particularized suspicion or past medical problem and therefore the across-the-board testing is a major dispute within the jurisdiction of the district court. They also argue that the drug-screen represents a new method of enforcing Rule G, which had been enforced primarily by supervisory observation. Such a unilateral change in the method of enforcement, they contend, constitutes a major dispute.

Conrail responds that the addition of drug screening is arguably justified by the parties' long-standing implied-in-fact agreement authorizing Conrail to test the urine of employees to identify workers who are medically unfit for duty. It claims that the new screening is within its prerogative to modify its medical standards and procedures as a result of advances in medical science and medical technology. Conrail contends that because

there was no practice of requiring some medical evidence of drug usage prior to urinalysis as part of its routine medical examination, its new program which adds the drug-screen component to such urinalysis is not a significant departure from past practice.

A.

Three other courts of appeals have considered the same or similar drug-testing issues under the RLA, with varying results and rationales. In a pair of cases, the Ninth Circuit denominated as major disputes the use of drug-detecting dogs, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1102 (9th Cir. 1988) (*Dog Search Case*), and mandatory urinalysis testing of crewpeople implicated in "human-factor" accidents or operating-rule violations, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087 (9th Cir. 1988) (*Chemical Testing Case*), as a means of enforcing Rule G.

The majority's decision in the *Chemical Testing Case* was based chiefly on the "critical differences between the old method and the new method: the old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion." *Id.* at 1092. It noted that the enforcement method employed in the past — the supervisor's "observing an employee's gait, breath, odor, slurred speech, or bloodshot eyes — was non-intrusive." *Id.* It rejected the railroad's claim that the union, by acquiescing "in Rule G's enforcement by sensory surveillance can be said to have agreed to allow [the railroad] to implement *any* procedure beyond sensory surveillance so long as the procedure is brought into play by . . . an 'objective triggering event.' " *Id.* The court also noted that it had recently held that the Fourth Amendment was violated by Federal Railway Administration regulations which imposed a similar testing

program based only on generalized suspicion arising from an accident. *Id.* at 1093 (citing *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988)). The court ruled that it would construe the implied agreement with the railroad in enforcing Rule G as containing the same expectation of privacy as to the employer as the worker had as to the government. *Id.* at 1093. Because the new mandatory urine testing program changed the working conditions governed by the bargaining agreement, it was "by definition" a major dispute. *Id.*

In the *Dog Search Case*, involving the use of trained dogs to randomly search for drugs, the court again relied on the fact that previous practice under Rule G had always required "a triggering event", the perception of facts by an official suggesting that a specific employee was under the influence of alcohol or drugs. 838 F.2d at 1105. Furthermore, the court construed the parties' implied agreement as directed to whether an employee was under the influence of a prohibited substance, unlike the newly imposed search which was directed to detecting possession to prevent future use. *Id.*

Railway Labor Executives Association v. Norfolk & Western Railway Co., 833 F.2d 700 (7th Cir. 1987), presented the Seventh Circuit with issues almost identical to those we confront here. As here, the railroad added a drug screen to the urinalysis that had been a routine element of the medical examination. Rejecting the unions' argument that the drug-screening intruded into employees' conduct outside of the workplace, the court held that "[t]he addition of a drug screen as a second component of the urinalysis previously required of all employees does not constitute such a drastic change in the nature of the employees' routine medical examination or the parties' past practices that it cannot arguably be justified by reference to the parties' agreement." *Id.* at 706. The court of appeals rejected the unions' argument that the testing was designed to

enforce Rule G, holding that the district court's factual finding "that [the railroad] had not made any unilateral changes in the enforcement of Rule G" was not clearly erroneous. *Id.* at 707.

There were two separate testing issues before the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986). One, which is not at issue here, concerned the railroad's institution of post-incident testing to enforce Rule G. The court unanimously concluded that although the ground rules between the parties governing Rule G enforcement required suspicion of impairment to justify a test, the urinalysis " 'of the individual crew member having . . . exclusive responsibility for the action triggering the incident' " or other crew members "only when individual responsibility is not clear" satisfied that suspicion requirement and would not be "such a serious departure from past practice as to give rise to a major dispute." *Id.* at 1023 (quoting railroad policy).

The court divided on the second issue, the railroad's institution of a drug screen as part of its periodic and return-to-duty medical exams. Two members of the court tersely reversed the district court's finding that the medical examination screening presented a major dispute. The majority noted that the union did not deny that the agreement allowed medical testing to identify workers who were unfit for duty, and stated that consequently, "all that is involved in the parties' dispute is the extent to which the urinalysis component of these examinations may be refined in order to predict safe employee performance." *Id.* at 1024; *see also International Ass'n of Machinists, District Lodge 19 v. Southern Pacific Transp. Co.*, 105 LRRM 2046 (E.D. Cal. 1980) (use of alcohol breath test a minor dispute). Judge Arnold, in dissent, stressed that regardless of whether the testing was characterized as a medical or disciplinary matter, the medical testing program could result in

an employee's being fired without any prior suspicion of drug use. 802 F.2d at 1025 (Arnold, J., dissenting in part). "This new examination is universal and indiscriminate, in the sense that it is imposed without regard to any degree of suspicion that the employee is working while impaired." *Id.* at 1024. Such a change, he argued, was too significant to go forward without negotiations between the parties.

B.

The absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts. When a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue. In this case, we must determine whether the existing agreement arguably admits of an implied term encompassing the new drug screening. *See Chemical Testing Case*, 838 F.2d at 1092-93; *cf. Transportation-Communication Employees Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 160-61 (1966) ("In order to interpret [a collective bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.")

The district court held that the new testing was arguably within the terms of the existing medical examination agreement. We reach a contrary legal conclusion because the undisputed terms of the implied agreement governing medical examinations cannot be plausibly interpreted to justify the new testing program.

Under the stipulation agreed to by the parties, use of a drug screen was included as part of the urinalysis in

return-to-duty physical examinations "when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71. It was included as part of the periodic physical examination only in the latter situation, "when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71-72.

Conrail argues that because it has been conducting drug-screen urinalysis from time to time since 1976, there is an arguable contractual basis for its imposition of drug screening as part of its routine medical examinations.[3] This argument overlooks what to us is the determinative distinction between the old and new practice: before, drug screening was included only when there was particularized cause and not as part of the routine urinalysis. The fact that the prior agreement encompassed drug screening only in instances where there was cause and limited the routinely administered urinalysis to tests for blood sugar and albumin persuades us to reject Conrail's argument that the medical testing agreement justifies testing without cause.

If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that

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3. In 1984, Conrail issued a new medical standards manual requiring a drug screen to be carried out in connection with all periodic examination urinalyses. The mandated testing was performed in only one of its four administrative regions, and was discontinued for budgetary reasons after six months. Conrail does not contend that this period of limited uniform testing without the apparent knowledge or agreement of the Unions worked a change in the parties' general agreement governing medical testing. *See generally* Baker v. United Transp. Union, 455 F.2d 149, 156 (3d Cir. 1971) (practice became part of parties' agreement where "the railroad has engaged in a certain activity over a sufficient period of time for the union to become aware of it and react accordingly if it objects").

of Rule G, the disciplinary rule aimed specifically at substance abuse. Under Rule G, only employees who are impaired while on the job or on call may be disciplined, whereas an employee whose drug use is detected through the new medical testing program may be fired even though s/he was never found to be impaired while at work or subject to duty.

Ultimately, Conrail's argument rests on the premise that testing urine for cannabis metabolites is no different in kind from testing urine for blood sugar. This ignores considerable differences in what is tested for and the consequences thereof. Employee drug testing is a controversial issue throughout the railroad industry and beyond. *See, e.g., Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (Customs Service employees), *cert. granted*, 108 S. Ct. 1072 (1988); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (race track jockeys), *cert. denied*, 107 S. Ct. 577 (1986); *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 678 F. Supp. 543 (E.D. Pa. 1988) (municipal transport workers); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986) (paper mill workers); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 510, N.E.2d 325, 517 N.Y.S.2d 456 (1987) (school teachers). The practice poses serious ethical and practical dilemmas as well. *See, e.g., Substance Abuse in the Workplace: Readings in the Labor-Management Issues* (R. Hogler ed. 1987) [hereinafter *Substance Abuse*] (collecting commentary). We regard it as particularly significant that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations

Act. *See* National Labor Relations Board, Office of the General Counsel Mem. GC 87-5 (Sept. 8, 1987), *reprinted in* Daily Labor Report (BNA), No. 184 at D-1 (Sept. 24, 1987) ("When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination.")

The function of bargaining over major disputes is obviously to reach agreement on terms and conditions which have not yet been addressed. Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed. *Cf. Shoemaker*, 795 F.2d at 1140, 1144; Rothstein, *Screening Workers for Drugs*, in *Substance Abuse, supra*, 115, 116-22. We search the past practices of the parties in vain for any indication of an agreement on these key matters. It follows that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen.

C.

The Unions also argue that the new testing is a change in working conditions in that it represents a change in the method of enforcing Rule G, which is itself a working condition. Conrail denies that its drug testing is designed to enforce Rule G, but argues that even if it were, the implementation of a new procedure to enforce Rule G would be a minor dispute. As we noted before, the only court of appeals to reach the issue of the characterization for RLA purposes of a change in the method of enforcement of Rule G ruled that it raised a major dispute. *See Chemical Testing Case*, 838 F.2d at 1092-93; *see also Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d at

1024-25 (Arnold, J., dissenting in part). However, in light of Conrail's disavowal of Rule G as a justification for the newly imposed drug screen and our conclusion that the existing medical policy did not arguably justify the drug screen, we need not reach the Rule G enforcement issue.

IV.

Conclusion

As we have explained above, Conrail's addition of drug screening to the urinalysis examination of employees as to whom Conrail has no particularized suspicion of drug use changes the terms and conditions governing the employment relationships. It therefore constitutes a major dispute which Conrail cannot impose unilaterally. Instead, the RLA requires that the parties must bargain under the prescribed procedure.

In so holding, we do not minimize the serious drug and alcohol problem in the transportation industry. *See, e.g.*, De Rosa, *Alcohol Problems in the Railroad Industry*, in *Substance Abuse, supra*, 29, 29 (reporting estimate that some 25 percent of railroad workers drink on duty or while subject to duty); *New Regulations to Control Substance Abuse in the Transportation Industry*, in *id.* at 31 (alcohol and drug abuse responsible for 37 deaths, 80 injuries and $34 million in property damage between 1975 and 1985). We also note that the Unions have stated in their brief that they "yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects." Appellants' Brief at 4. They will have an opportunity to effectuate this desire at the bargaining table.

The order of the district court dismissing the complaint for lack of subject matter jurisdiction will be reversed and the case remanded for further proceedings consistent with this opinion.

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1289

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Appellants

vs.

CONSOLIDATED RAIL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 1, 1988.

/s/ Dolores K. Sloviter
Circuit Judge

Dated: May 6, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	
Appellants	:	
vs.	:	NO. 87-1289
CONSOLIDATED RAIL CORPORATION	:	

ORDER

The foregoing Motion to Extend Mandate until July 24 is denied. The Stay of Mandate will be extended until June 10, 1988.

By the Court,

/s/ Dolores K. Sloviter

Dated: June 6, 1988

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	
Appellants	:	
VS.	:	
CONSOLIDATED RAIL CORPORATION	:	NO. 87-1289
Appellee.	:	

ORDER

The foregoing Motion is granted and the Stay of Mandate is extended until June 30, 1988.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: June 9, 1988

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	CIVIL ACTION
VS.	:	FILED APRIL 28, 1987
CONSOLIDATED RAIL CORPORATION	:	NO. 86-2698

ORDER

AND NOW, this 27th day of April, 1987, upon consideration of the parties' cross-motions for summary judgment, it is hereby ORDERED that plaintiffs' complaint is DISMISSED for lack of subject matter jurisdiction. My decision is based on the following:

1. Plaintiffs Railway Labor Executives' Association, *et al.* seek to enjoin defendant Consolidated Rail Corporation (Conrail) from requiring employees represented by plaintiffs to undergo alcohol and drug testing. Plaintiffs claim Conrail's unilateral imposition of drug testing is contrary to the requirements of the Railway Labor Act, ("RLA") 45 U.S.C. §§151-188, and violates the Fourth Amendment of the United States Constitution.

2. Defendant argues that drug testing during return-to-work and periodic physical examinations involves a "minor dispute" under the RLA, and is subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board or a public law board. *See* 45 U.S.C. §153.

3. Plaintiffs, however, maintain that their claim is a "major dispute" subject to federal injunctive relief until the parties resolve the question in a collective bargaining agreement.

4. A major dispute arises when the contested conduct is not based on a collective bargaining agreement or on the long-standing practices or recognized customs of the parties. *See Elgin, Joliet & Eastern R.R. Co. v. Burley*, 325 U.S. 711, 723-24 (1945); *Brotherhood of Maintenance v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986). *See also International Ass'n of Machinists v. Northwest Airlines*, 673 F.2d 700, 705-06 (3d Cir. 1982).

5. A minor dispute relates to the meaning or proper application of a particular provision of an existing agreement or long-standing practice. *See Brotherhood of Maintenance*, 802 F.2d at 1022.

6. A dispute is minor if the parties' agreement is reasonably susceptible of the contested interpretation or if the employer's action is arguably justified under the terms of the existing agreement. *Id.* Thus, the employer bears a "relatively light" burden of showing that its action is a minor change. *Id.*

7. Since its inception in 1976, Conrail has required all hourly employers to undergo periodic and return-to-duty physical examinations. These physicals have included urinalysis, but not a drug screen. *See* Stipulation ¶ 5, 6.

8. Under some circumstances, involving suspected drug use or prior drug problems however, Conrail has included a drug screen as part of a physical examination urinalysis. *See id.* ¶ 7.

9. Since February, 1987, Conrail has included a drug screen as part of all periodic and return-to-work physicals.

10. Therefore, Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy. The

union and Conrail always have shared a concern over drug and alcohol abuse, *see* Rule G, Stipulation ¶ 1, and since 1976 they have acquiesced in certain procedures to ensure an employee's fitness for the job. The parties always have recognized Conrail's right to remove from service employees who are unable to perform their duties safely. Conrail's drug testing program is a further refinement of that practice and is consistent with its right to ensure the safety of its operations.

11. Under these circumstances, Conrail's action constitutes a minor dispute, and for the reasons set forth in *Brotherhood of Maintenance*, 802 F.2d 1016; *Railway Labor Executives' Ass'n, et al. v. Southern Ry. Co.*, C.A. No. C86-1570 (N.D. Ga., Mar. 4, 1987); *Railway Labor Executives' Ass'n, et al. v. Norfolk & Western Ry. Co.*, C.A. No. 86-C-2064 (N.D. Ill., Feb. 2, 1987), I dismiss Counts I and II for lack of subject matter jurisdiction.

12. Although I could grant an injunction even in a minor dispute, this authority must be exercised only in rare cases where it is necessary to keep the controversy from growing into a major dispute. *See Brotherhood of Maintenance*, 802 F.2d at 1021-22. Plaintiffs have failed to show for purposes of this motion that this is a case calling for such exceptional relief.

13. Finally, I dismiss Count III (alleging a Fourth Amendment violation) because plaintiffs have failed to show for purposes of this motion that Conrail is a federal actor whose actions are subject to constitutional scrutiny. They claim that Conrail is a governmental enterprise because it was created by Congress and it relies heavily on federal funds. These arguments have been uniformly rejected by federal courts and I concur in their analysis. *See*,

e.g., Morin v. Consolidated Rail Corporation, 810 F.2d 720, 722-23 (7th Cir. 1987); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-55 (2d Cir. 1985); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Wenzer v. Consolidated Rail Corp.*, 464 F. Supp. 643, 647-49 (E.D. Pa.), *aff'd*, 612 F.2d 576 (3d Cir. 1979). Indeed, the Supreme Court has observed that despite federal involvement on the board of directors, Conrail is basically a private enterprise. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974).

/s/ A. Scirica
Anthony J. Scirica, J.
April 28, 1987

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such places of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 bidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provision of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with

the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper

court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation

fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than

that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after

such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section

shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers

and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court

shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the

compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority

conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional

boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be

compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and b.nding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

COMMONWEALTH OF :
PENNSYLVANIA :
: ss.
COUNTY OF PHILADELPHIA :

AFFIDAVIT

I, F. J. Ilsemann, Jr., being duly sworn according to law, depose and say as follows:

1. I am employed by Consolidated Rail Corporation (hereinafter "Conrail") as Director of Health Services. In that capacity, I have overall responsibility for formulating medical standards applicable to Conrail employees and supervising the implementation of medical policies and procedures consistent with these medical standards. These medical standards include those applicable to the periodic, return-to-duty and follow-up physical examinations required of Conrail employees.

2. As a result of advances in medical science and medical technology, Conrail has periodically revised its medical standards. For example, for many years Conrail relied upon an examining physician's voice to conduct employee hearing tests. Conrail modified its procedures, however, to provide for the use of audiometers to conduct such tests. Similarly, Conrail now conducts spirometric examinations, measuring lung capacity, using computers rather than the calibrated bellows used in the past. Conrail has also revised its methods of conducting electrocardiograms and visual examinations based on advances in medical technology. These modifications have been made unilaterally without any consultation with Conrail's unions.

3. Conrail requires its employees to undergo several types of medical examinations including

periodic physicals, return-to-duty physicals and return-to-duty follow-up examinations. These examinations have been routinely conducted since at least the time of Conrail's inception in 1976. Descriptions of these examinations and the employees to whom they apply are set forth in Conrail's Medical Standards Manual. Relevant portions of the Medical Standards Manual are attached hereto as Attachment A.

4. Conrail requires employees to undergo periodic physical examinations every three years up to and including age fifty and every two years thereafter, with some exceptions as set forth in Attachment A. All periodic physical examinations have routinely included a urinalysis for blood sugar and albumin. A drug screen was also included as part of the periodic physical urinalysis when, in the judgment of the examining physician, the employee may have been using drugs. On April 1, 1984, Conrail issued a Medical Standards Manual, attached hereto as Attachment A, which provided that a drug screen would be included as part of all periodic physical urinalyses. For budgetary reasons, this policy was only applied in one of Conrail's regions, the Eastern Region, for a six month period and was then discontinued (Conrail's rail operations are divided into four regions: the Eastern Region, headquartered in Philadelphia; the Western Region, headquartered in Detroit; the Northeastern Region, headquartered in Selkirk, New York; and the Central Region, headquartered in Pittsburgh). Conrail then returned to its original policy of including drug screens as part of the periodic physical urinalysis only when, in the physician's judgment, the employee may have been using drugs. On February 20, 1987, however, Conrail announced that drug screens would be included as part of all periodic physical urinalyses.

5. With respect to return-to-duty physical examinations, such examinations have been required of all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension, or similar causes. Other employees who have been out of service for at least ninety days are also required to undergo physical examinations upon returning to duty. These examinations have routinely included a urinalysis for blood sugar and albumin. In addition, a drug screen was originally included as part of the urinalysis when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. When Conrail issued its Medical Standards Manual on April 1, 1984, the manual provided that drug screens would be included as part of all return-to-duty urinalyses. As with periodic physical examinations, this policy was only applied to Conrail's Eastern Region for a six-month period. Conrail thereafter returned to its original policy of requiring a drug screen only when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the physician, the employee may have been using drugs. On February 20, 1987, however, Conrail also announced that a drug screen would be included as part of all return-to-duty urinalyses.

6. With respect to return-to-duty follow-up examinations, also known as periodic-special examinations, Conrail's Department of Health Services has been responsible for determining whether an employee's condition justified requiring follow-up examinations to evaluate the employee's continuing fitness to work after he or she has returned to duty. Such follow-up examinations have, for example, been required of employees who have suffered heart

attacks, or have been diagnosed as having hypertension or epilepsy. On February 20, 1987, Conrail announced that its follow-up examination policy would also apply to employees who return to duty from being disqualified for any reason associated with drug use.

7. Since at least the time of its inception in 1976, Conrail has required that any employee who undergoes a periodic, return-to-duty or follow-up physical examination and who fails to meet Conrail's established medical standards may be held out of service without pay until the condition is corrected or eliminated. Thus, for example, employees have been held out of service until their vision can be corrected or their blood pressure reduced to meet medical standards. Employees have also been held out of service if their blood sugar, as revealed by urinalysis, is too high. Employees who fail to meet Conrail's medical standards by testing positive for illegal drugs will not be returned to service unless they can provide a negative drug test within forty-five days from a medical facility to which the employee is referred by Conrail's Medical Director. This forty-five day period begins on the date of the letter notifying the employee that he or she is being withheld from service. An employee whose first test is positive is given the opportunity for an evaluation by Conrail's Employee Counseling Service. If the evaluation reveals an addiction problem and the employee agrees to enter an approved treatment program, the employee will be given an extended period of 125 days to provide a negative drug test.

8. Conrail also requires job applicants to submit to a drug screen as part of the urinalysis which is required of all applicants during pre-employment physicals. These drug screens are also part of the

physical examinations required of Conrail's executives. Conrail does not, however, conduct "reasonable suspicion" testing of its employees as authorized by the Federal Railroad Administration's regulations entitled "Control of Alcohol and Drug Use in Railroad Operations."

9. The foregoing facts are true and correct and based upon my personal knowledge, and knowledge obtained by me in the course of the performance of my duties as Director of Health Services.

/s/ F. J. Ilsemann, Jr.
F. J. Ilsemann, Jr.

Sworn to me and subscribed
before me this 6th day of
March, 1987.

/s/ Alfonso J. DiGregorio
Notary Public

ALFONSO J. DiGREGORIO
Notary Public, Philadelphia,
Philadelphia Co.
My Commission Expires
September 24, 1988

IV. DESCRIPTION OF MEDICAL EXAMINATIONS

PRE-EMPLOYMENT

Who:	All job applicants
Content:	Full medical history
	Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight
	Routine urinalysis, including a screen for the use of controlled substances
	Visual examination for near and distant vision, uncorrected and corrected
	Color vision evaluation
	Hearing examination, including baseline audiogram
	Spirometry
	Base line EKG for all Class A applicants
Frequency:	At the time of employment
Forms used:	MD-40 and MD-1

PERIODIC-REGULAR

Who:	All employees as listed in frequency schedule below
Content:	Full medical history
	Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight
	Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination if employee is subject to the Hearing Conservation Program

Spirometry

EKG required only on Locomotive Engineers, Hostlers or Firemen

Frequency: Positions listed below require periodic examinations every three years up to and including age 50 and every two years thereafter, with exceptions noted:

Train and Engine Service Employees (Locomotive Engineer, Fireman, Hostler, Conductor, Brakeman, Flagman, Switchtender) Exception: State of New Jersey requires annual periodic examination of Locomotive Engineers

Road Foreman of Engines

Trainmaster

Block Operator, Towerman, Leverman

Crane or Derrick Operator, Machine Operator (Class 1 and 2)

Operator of Over-the-Highway Vehicles Exception: Operator of Over-the-Highway Vehicles require periodic examination every two years

Police Officer

Inspection and Repair Foreman

Employee engaged in preparation/serving food. Exception: must be examined annually

Train Dispatcher

Any non-agreement employee who works around heavy moving equipment Exception: Division Superintendents must be examined annually

Supervisory positions in Systems Operations Bureau Exception: Must be examined annually

Forms used: MD-40 and MD-2D

PERIODIC-SPECIAL

Who: In-service employees requiring re-evaluation of an existing condition as initiated by examining physician.

Content: Medical re-evaluation of pre-existing condition after appropriate interval set by examining physician at initial examination.

Frequency: As established by examining physician (e.g. 1 month, 3 months, etc.)

Forms used: MD-40 and MD-2D or MD-2C.

RETURN FROM FURLOUGH, LEAVE, SUSPENSION OR SIMILAR CAUSES

Who: Employees who are returning to service after an absence for other than disability reasons.

Content: Full medical history

Complete physical examination, including funduscopic blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

	Color vision evaluation
	Hearing examination if employee is subject to the Hearing Conservation Program
	Spirometry
	EKG, required only on Locomotive Engineers, Hostlers or Firemen.
Frequency:	Required of Train and Engine Service employees after 30 days absence
	Required of all employees, other than Train and Engine Service, absent more than 90 days
Forms used:	MD-40 and MD-2D or MD-2C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, *Plaintiffs*,	)	
v.	)	Civil Action NO. 86-2698
CONSOLIDATED RAIL CORPORATION, *Defendant*.	)	

STIPULATION

In the interest of obviating the need for extensive discovery, counsel for Plaintiff Unions and counsel for Defendant Consolidated Rail Corporation (hereinafter "Conrail") hereby agree to the following facts:

1. Since at least the time of Conrail's inception in 1976, Conrail employees, both those covered by the Hours of Service Act, 45 U.S.C. §§61-64d (hereinafter "the Act"), and those not covered by the Act, have been subject to the provisions of Rule G or rules that are identical in substance to Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

2. Conrail has relied upon two methods of enforcing Rule G: 1) supervisory observation; and 2)

encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine or other diagnostic tests.

3. In August, 1985, the Federal Railroad Administration of the United States Department of Transportation promulgated regulations at 49 C.F.R. §219 *et seq.*, mandating post accident toxicological testing for railroad employees covered by the Hours of Service Act. These regulations became effective on February 10, 1986.

4. Since March 10, 1986, Conrail has required all employees covered by the Hours of Service Act to undergo post-accident toxicological testing as required by the regulations promulgated by the Federal Railroad Administration. Employees who are not covered by the Act are not required to undergo post-accident toxicological testing.

5. Since at least the time of its inception in 1976, Conrail has required all hourly employees, both those covered by the Hours of Service Act and those not covered by the Act, to undergo periodic physical examinations. These periodic examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

6. Since at least the time of its inception in 1976, Conrail has required all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension or similar causes to undergo physical examinations upon returning to duty. In addition, since at least the time of its inception in 1976, Conrail has also required all other employees who have been out of service for at least ninety days due to furlough,

leave, suspension or similar causes to undergo physical examinations upon returning to duty. Return-to-duty physical examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

7. Since at least the time of its inception in 1976, Conrail has included a drug screen as part of the return-to-duty and periodic physical examination urinalyses of certain employees. With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

Respectfully submitted,

Of Counsel:

MORGAN, LEWIS & BOCKIUS

/s/ Joseph J. Costello
DENNIS J. MORIKAWA
JOSEPH J. COSTELLO
2000 One Logan Square
Philadelphia, PA 19103

HERMON M. WELLS
CONSOLIDATED RAIL CORPORATION
6 Penn Center Plaza
Philadelphia, PA 19104

Attorneys for Defendant
Consolidated Rail Corporation

/s/ Lawrence M. Mann
LAWRENCE M. MANN
DEBORAH E. REISER
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

Of Counsel:

ALPER, MANN & REISER

CORNELIUS O'BRIEN
1500 Market Street
Philadelphia, PA 19102

Attorneys for Plaintiff
Unions

Approved and So Ordered this 11th day of February, 1987.

/s/ A. Scirica
U.S.D.C.J.